

MARR JONES & WANG

A LIMITED LIABILITY LAW PARTNERSHIP

BARRY W. MARR 1937-0

CHRISTOPHER S. YEH 6777-0

Pauahi Tower

1003 Bishop Street, Suite 1500

Honolulu, Hawaii 96813

Tel. No. (808) 536-4900

Fax No. (808) 536-6700

Attorneys for Employer

MATSON TERMINALS, INC.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:

MATSON TERMINALS, INC.,

and

HAWAII TEAMSTERS & ALLIED
WORKERS UNION, LOCAL 996.

Case 20-CA-188087

POST-HEARING BRIEF ON BEHALF OF
THE EMPLOYER MATSON TERMINALS,
INC.'S; CERTIFICATE OF SERVICE

TABLE OF CONTENTS

I. INTRODUCTION	1
II. FACTS	2
A. General	2
B. Teamsters Classifications.....	3
C. ILWU Wharf Clerks	8
D. Paperwork Delivery	10
1. Generally	10
2. Performing Paperwork Delivery	13
a. Pre-July 2016	14
b. July 2016 and thereafter	15
c. No Material Impact on the Teamsters Bargaining Unit.....	18
E. Legal Proceedings	21
III. DISCUSSION	22
A. The Paperwork Delivery Change Was Not Unlawful Because It Was Necessitated by the Wharf Clerk CBA.....	23
B. The Paperwork Delivery Change Was Not Unlawful Because It Was Not Material, Substantial, and Significant	25
C. There Is No Obligation To Give The Paperwork Delivery Exclusively To The Runner.....	33
IV. CONCLUSION.....	34

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Alamo Cement Co.,</i> 277 NLRB 1031 (1985)	28
<i>Edro Corp. dba Dynawash,</i> 2015 NLRB LEXIS 228, 362 NLRB No. 53 (2015)	34
<i>Ead Motors Eastern Air Devices, Inc.,</i> 346 NLRB 1060 (2006)	26
<i>Exxon Shipping Company,</i> 312 NLRB 566 (1993)	23
<i>Federated Logistics and Operations,</i> 340 NLRB 255 (2003)	34
<i>Hampton House,</i> 317 NLRB 1005 (1995)	26
<i>Herbert Harvey, Inc. v. NLRB,</i> 424 F.3d 770 (D.C. Cir. 1969)	23
<i>J.W. Fergusson & Sons, Inc.,</i> 299 NLRB 882 (1990)	28
<i>Jason Lopez' Planet Earth Landscapes, Inc.,</i> 358 NLRB No. 46 (2012)	34
<i>Kohler Co.,</i> 273 NLRB 1580 (1985)	26
<i>McKesson Corp.,</i> 2014 NLRB LEXIS 851 (2014)	28
<i>Mike-Sell's Potato Chip Co.,</i> 2017 NLRB LEXIS 374 (2017)	29
<i>MMC Materials, Inc.,</i> 2005 NLRB LEXIS 538 (2005)	27
<i>Murphy Oil USA, Inc.,</i> 286 NLRB 1039 (1987)	23

<i>NLRB v. Laney & Duke Storage Warehouse Co.,</i> 369 F.2d 859 (5th Cir. 1966)	34
<i>North Star Steel Co.,</i> 347 NLRB 1364 (2006)	25, 27, 28
<i>Peerless Food Products, Inc.,</i> 236 NLRB 161 (1978)	25, 28
<i>Raytheon Technical Services,</i> 126 LA 982 (Arb. Robert Kilroy, 2009)	23
<i>Rust Craft Broadcasting of New York,</i> 225 NLRB 327 (1976)	25
<i>Standard Candy Co.,</i> 147 NLRB 1070 (1964)	23
<i>Stone & Thomas,</i> 221 NLRB 573 (1975)	26
<i>The Fremont-Rideout Health Group,</i> 357 NLRB 1899 (2011)	28
<i>Westinghouse Elec.,</i> 313 NLRB 452 (1993)	26

**POST-HEARING BRIEF ON BEHALF OF
THE EMPLOYER MATSON TERMINALS, INC.**

I. INTRODUCTION

This proceeding arises from an unfair labor practice charge (Charge 20-CA-188087) filed by the Hawaii Teamsters & Allied Workers Union, Local 996 (“Teamsters”) against Respondent Matson Terminals, Inc. (“Matson”). GC Ex. 1(a). Subsequently, a Complaint was filed alleging that Matson unilaterally reduced the Teamsters employees’ work opportunity in picking up and delivering paperwork. GC Ex. 1(c) at sec. 7(a).

On June 19, 2018, a hearing was conducted on this Complaint. The General Counsel called one witness – Tammy Escorzon who is a Matson Superintendent. Matson called two witnesses – Wayne Teegarden who is Matson’s General Manager of Vessel Stevedoring (and who has previously held all levels of stevedoring positions at Matson),¹ and Matthew Bright who is a General Superintendent (and who has in the past few years held the position of Superintendent and Senior Superintendent).²

As shown at the hearing, although a non-Teamster employee (the Assist Clerk in the ILWU Wharf Clerk unit) did start performing the paperwork delivery function traditionally performed by the Teamster Superintendent Runner, this was not an unfair labor practice for two alternative reasons.

¹ Teegarden has held every stevedoring position at Matson as follows: Superintendent (1988-90), Senior Superintendent (1990-1997), Cargo Operations Manager at Matson Navigation (1997-1998), General Superintendent (1998-2001), Manager of Vessel Stevedoring (2001-2013), and General Manager (2013-present). Tr 116. As General Manager, Teegarden oversees vessel stevedoring, which includes budgeting and day-to-day and weekly discharge and loadback operations. Tr 116.

² Bright’s positions at Matson have been as follows: Container Yard Supervisor (2002-2006); CVS Superintendent (2006-2011); CVS Senior Superintendent (2011-2016); and General Superintendent (2016-present). Tr 189-90.

First, under Matson's collective bargaining agreement with the ILWU, the Wharf Clerk has the jurisdictional right to perform such paperwork delivery, and Matson was obligated to recognize that right.

Second, and in the alternative, the involvement of the Assist Clerk in paperwork delivery was not a material, substantial, and significant change: It had no impact whatsoever on the vast majority of positions in the Teamsters bargaining unit as they are not involved in the paperwork delivery. Moreover, even as to the one position that it did impact (the Superintendent Runner), it still did not affect wages, compensation, schedule, or hours; it merely removed a small amount of the Runner's work (less than six months per shift) without any corresponding loss in pay, and the Runner continues to have numerous and important duties to perform, including the transporting of labor.

II. FACTS

A. General

Matson is an ocean shipping company that ships goods from the West Coast to Hawaii, the neighbor islands (*i.e.*, Hawaiian islands other than Oahu), South Pacific, China, and Japan.

Tr 115. Matson's Oahu operation is located at Sand Island Parkway. *Id.*

Matson has two daily shifts – a day shift (7:00 a.m. to 6:00 p.m.) and a night shift (6:00 p.m. to 5:00 a.m.). Tr 117; *see also* Tr 30. Matson's operations run every day. Tr 32.

Matson's discharge operations involve discharging containers off a vessel or barge. Tr 142. Matson's loadback operations involving loading back containers onto a vessel or barge. Tr 142.

Matson has a General Manager of Vessel Stevedoring, who is Wayne Teegarden. Tr 115.

Below the General Manager in the vessel stevedoring operations are the following positions (in order):

- 1 Manager Vessel Stevedoring
- 3 General Superintendents
- 5 Senior Superintendents (Teamsters)
- 31 Superintendents (Teamsters)
- Laborers and Wharf Clerks (ILWU).

Tr 117.

B. Teamsters Classifications

In June 2014, the Board issued a Certification of Representative for the Teamsters to represent four classifications: Container Yard Supervisors, Yard Controllers, Senior Superintendents, and Superintendents. Jt. Ex. 1.

Those four Teamsters classifications encompass a total of 49 employees, consisting of 8 Container Yard Supervisors, 5 Yard Controllers, 5 Senior Superintendents, and 31 Superintendents. Tr 11.

On a typical shift with stevedoring operations, there are a total of 18-20 Teamsters employees consisting of 4 Container Yard Supervisors, 2 Yard Controllers, 2 Senior Superintendents, and 10-12 Superintendents. Tr 124; *see also* Tr 38.

Regarding the Container Yard Supervisor (aka Supervisor Yard Operations), general duties include dealing with customers coming in the gate and yard grooming, such as opening up stalls for containers. Tr 125.³

³ *See also* ER Ex. 2 (job description stating that position's "Nature and scope" is to, among other things, "execute the day-to-day management of container yard operations including container inventory, for efficient vessel discharge and load, and truck processing. The incumbents directly supervise a broad range of yard activities including community pick-ups, delivery, flips and positioning requests").

Regarding the Yard Controller, general duties include creating the flow plan and assigning areas of the container yard that will be used during a particular vessel operation. Tr 127.⁴

Regarding the Senior Superintendent, there are two rotations – the Water Tower Senior Superintendent, and the Outside Senior Superintendent. Tr 129. The Water Tower Senior Superintendent’s duties include checking in crane operators and assigning cab drivers to their machines at the start of the shift, then going to the Water Tower to monitor the cabs in the yard and to oversee the Chief Clerk who is also in the Water Tower. Tr 132.⁵ The Outside Senior Superintendent’s duties include making sure the Superintendents have their correct manning, working with Dispatchers to ensure there is adequate labor, and monitoring activities at the pier apron and container yard. Tr 133.⁶

Regarding the Superintendent, there are six positions for this classification: (1) Ship Superintendent, (2) Wharf Superintendent (aka Crane Superintendent), (3) RORO (roll-on/roll-off) Superintendent, (4) Auto Superintendent, (5) Water Tower Superintendent, and (6) Runner Superintendent. ER Ex. 7; Tr 134; *see also* Tr 33. A Superintendent generally rotates through

⁴ *See also* ER Ex. 3 (job description stating that position’s “Nature and Scope” is to, among other things, “direct and oversee the planning activities of the planners in Draper Utah. The incumbent ensures that terminal resources and equipment are utilized to maximize terminal operational efficiencies. Utilizing Company automated systems, develops short and long range terminal base plans and coordinates this process with the operating departments”).

⁵ *See also* GC Ex. 3 at 27 (job description stating that duties include, among other things, “Pre-assignment of drivers based on low/high hour jobs,” “Ensure CO’s [cab operators] are present and accounted for at the ck-in and during the course of the shift,” “Oversee and direct Chief clerk and Matson superintendents assigned to the Water Tower,” “Monitor computer screens to ensure work queues and job assignments are continuous,” etc.).

⁶ *See also* GC Ex. 3 at 28 (job description stating that duties include, among other things, “Present at labor check-in before the start of shift and after meal period,” “assist and oversee check-in process,” “work with timekeepers on any labor changes such as replacements, shifting,” “responsible for the supervision and performance of all the supts working outside,” etc.).

each of these positions, except that part-time Superintendents do not rotate into the Water Tower position. Tr 31.

On any given shift, there could be multiple individuals in each of these Superintendent positions, except the Runner position which will have at most only one individual. Tr 135-36; *see also* Tr 35-37. In addition, there have been many times – *i.e.*, once or twice each week – when there is not a Runner on a shift, such as due to unavailability and absenteeism. Tr 136, 141, 197, 198 (no Runner on a shift once or twice each week); *see also* Tr 37-38.

The Ship Superintendent's duties involve being on the vessel and having overall responsibility for the vessel, which includes communicating with the vessel crew, making sure reefers (refrigerated containers) are plugged or unplugged, and overseeing the manning and safety on the vessel. Tr 137.⁷

The Wharf Superintendent's duties involve overseeing the manning for the particular assigned crane, ensuring the workers' safety, and monitoring that they are not in traffic lanes. Tr 129.⁸

The RORO Superintendent's duties apply to the roll-on/roll-of operation where the containers are placed on wheels/chassis, and the duties involve ensuring that the right containers are being loaded or discharged and appropriately lashed or unlashd. Tr 138.

⁷ *See also* GC Ex. 3 at 30 (job description stating that duties include, among other things, "responsible for the overall manning and safety of the vessel," "overall safety of all CVS labor working on and around the vessel," "work with mate/engineer to ensure reefer rows/hatches on vessel are unplugged/plugged in a timely manner," etc.).

⁸ *See also* GC Ex. 3 at 29 (job description stating that duties include "Report to labor break area and obtain manning assignments," "Ensure a safe working environment for all labor (including MO's and CO's) assigned to that crane and proper container loading and unloading procedures are being followed. You are responsible to ensure traffic flows continuously and correct traffic patterns are be[ing] followed," "You are the eyes and ears for the Water Tower so keep them informed and involved with what is happening such as crane break downs, bathroom breaks, cntr numbers not on your plans, etc," etc.).

The Auto Superintendent's duties involve overseeing the loading and unloading of self-driven cargo (*e.g.*, cars, trucks), including safety and parking in the right spaces. Tr 139.

The Water Tower Superintendent's duties involve monitoring cab drivers, ensuring they are working on the right crane, and ensuring equipment is placed in the right bays. The Water Tower Superintendent uses two computer screens. Tr 139.

The Runner Superintendent's duties involve transporting labor between the break area and the work area (cranes or vessels), ensuring safety (*e.g.*, that people are not walking around the operations), monitoring the yard for hazards (*e.g.*, cones on the crane tracks), checking for chassis and bombcarts parked in wrong areas, ensuring cone baskets are set up properly, and performing other tasks. Tr 139-41; *see also* Tr 52 (Escorzon's description of running the labor).⁹

As Escorzon testified:

The runner transports manning. He kind of does all the odd jobs to help the operation continue, so he delivers men so that the wharf clerks don't leave – wharf supts, excuse me – so the superintendents don't leave their position under the crane. So he'll run the manning back and forth, he'll change out the signalmen. He goes through the yard. He'll check – he can be called to different places in the yard to assist in different areas. He kind of just does all the odd jobs. He's not – he an assist, kind of like, to the operation.

Tr 50.

There is an important safety reason for the Runner to transport the laborers: Multiple cabs can be driving on the apron, so laborers should not be walking on the apron. Tr 140; Tr 92-

⁹ *See also* GC Ex. 3 at 31 (job description stating that duties include "Responsible for transportation of all labor to and from the vessel and crane," "patrol the apron and yard and report any hazards and potential hazards," "monitor cab drivers to ensure the proper parking of chassis and bombcarts in the yard and not on the apron," "Work with high lift driver and wharf supt to ensure cone baskets are set up properly," etc.).

93 (Escorzon's testimony that safety is a primary concern and that the Runner's transport of labor is important for safety purposes). There is also an important safety reason for patrolling the apron – to identify and eliminate safety hazards such as a chassis parked in the wrong spot or a cone left near a gantry crane trench. Tr 98-99.

If there is a Runner on the shift, it is the Runner – not the Wharf Superintendent – who should be transporting the laborers because the Wharf Superintendent is needed to supervise the crane clerk and crane operations, and the crane should not be left unsupervised. Tr 140.

Transporting the laborers is the Runner's most time-consuming task. Tr 141. For each crane in operation during a shift, the Runner needs to transport various types of laborers – including the Rod Gang, X-Men, Signal Men, Cone Men, and Pin Men – and each laborer group might have to be separately transported from the other groups. Tr 191-92; *see also* Tr 94-97.¹⁰ Moreover, whenever a laborer group goes to work at the crane or vessel, this involves a pair of transports – *i.e.*, one trip from the break area to the work site and then a return trip back. Tr 191-93; *see also* Tr 95-96. In addition, some of the laborers (Cone Men and Pin Men) need multiple back-and-forth trips. Tr 191-93; *see also* Tr 96-97. In addition, this series of transports is for one crane; if there were three cranes in operations, then the above series of transports is multiplied by three. Tr 193.

On a startup operation (when a vessel arrives), there are approximately 40 transports during a shift. Tr 194. On a non-startup operation, there are approximately 20 transports during a shift. Tr 194.

¹⁰ In addition, the Runner also transports the Lasher and the Ship Mate. Tr 96, 107.

Transporting labor can involve waiting for the laborers to assemble. Tr 206. As testified by Escorzon, a transport takes about or up to 10 minutes. Tr 54 (“Every time you run the guys maybe about ten minutes, depending on how far the operation is”). Bright testified that it can take 1 to 5 minutes. Tr 207. A discussion of the aggregate weekly time spent on transporting labor is set forth in Section III.B., *infra*.

Even when the Runner is not transporting labor, he or she could be doing any of their other duties, as described in their job description and including patrolling the apron for hazards (*e.g.*, looking for locking cones in the crane trench), looking for chassis parked in blind areas, and filling out time cards. Tr 194.

C. ILWU Wharf Clerks

Matson has a classification of employees called Wharf Clerks who are represented by the ILWU. Tr 117-18.

The Wharf Clerk’s jurisdiction includes “the flow of cargo” – that is, cargo as it comes into Matson’s gate, is positioned in the container yard, moves to and from the crane, and is loaded by the crane onto the ship. Tr 118. For instance, Section 2.B.2.02 of the Wharf Clerk collective bargaining agreement¹¹ lists duties within the Wharf Clerk’s jurisdiction and expressly includes “stowage”:

The provisions of this Agreement shall apply to all delivery and receipt of cargo, to the listing and spotting of cargo, to the checking of diversions and transshipments, to posting of icehouse and perishable cargo, to cargo laden work, to stowage . . .

¹¹ The CBA is between the ILWU and McCabe Hamilton and Renny, which is Matson’s stevedoring company. McCabe provides Matson with the CBA-covered labor (including wharf clerks), and Matson follows the CBA with regard to those loaned wharf clerks. Tr 119.

ER Ex. 1 at 3 (Sec. 2.B.2.02) (emphasis added); Tr 121. “Stowage” is the process for loading containers onto a vessel and into a particular row or hatch. Tr 118.

The CBA also incorporates a September 15, 2008 Letter of Understanding which recognizes that “directing and executing the flow of cargo” are “traditionally wharf clerk functions”:

All new duties that are traditionally wharf clerk functions generally identified as directing and executing the flow of cargo, the Employer shall first discuss the work jurisdictional issues in a meeting with the Union and the Unit Chair.

ER Ex. 1 at 38 (emphasis added); Tr 122.

In 2005 or 2006, the ILWU asserted that Clerks, not Superintendents, should be directing the drivers as they move cargo on the RORO operations. Based on the contract language, Matson took this work away from Superintendents and began having the Clerks perform it. Tr 184.

In April 2016, Matson was implementing a new technology involving handheld computers (MDTs) to be used by the Clerks. Tr 182; *see also* TR 143-144. Matson and the ILWU met and agreed to the creation of an Assist Clerk position within the Wharf Clerk bargaining unit. Tr 123.¹² At the end of April 2016, Matson hired the Assist Clerk to provide training on using the MDT. Tr 182. On May 4, 2016, the Assist Clerk began performing assignments. Tr 123; 198.

¹² The Wharf Clerk CBA expressly allows for changes or additions in Wharf Clerk functions. ER Ex. 1 at 3 (Sec. 2.02.B.2.04).

In August 2016, Matson hired an extra Clerk to perform OCR work (optical character resolution, another new technology). Tr 177. This new OCR clerk position was different from the Assist Clerk position which, as noted above, had previously started in May 2016. Tr 177-78, 181-82.¹³

D. Paperwork Delivery

1. Generally

Matson has six operable gantry cranes, along with a seventh one that has been inoperable for years. Tr 141. The typical manning for a gantry crane is one Wharf Superintendent (aka Crane Superintendent), one Crane Operator, one Crane Clerk, and additional labor as needed. Tr 141.

Matson has a Water Tower, which is a portable shelter lifted on I-beams, 10 to 15 feet in the air. Tr 142. The Water Tower Senior Superintendent, Chief Clerk, and up to three additional Clerks, work in the Water Tower. Tr 142.

On Employer Exhibit 10 (a construction blueprint which has been accurate going back to at least 2016), the Water Tower is represented by a black box labeled “Water Tower.” Tr 152; ER Ex. 10. The yellow-shaded area is the apron, and the two lines along the apron are the tracks that allow the gantry cranes to move along the apron. Tr 152. The boxes labeled “1” through “7” each represents a gantry crane and the crane’s position relative to the depicted vessel and barges. Tr 153. Crane 6 is inoperable and sits stationary at the zero foot mark of Pier 52 (the knuckle between Pier 51 and Pier 52). Tr 159; ER Ex. 10. On the blueprint, there are

¹³ Although Teegarden had said in deposition that the Assist Clerk position started in August 2016, he had inadvertently misremembered the date. Tr 180-81. A letter of correction was sent to GC’s Counsel prior to the instant hearing. Tr 187; ER Ex. 14.

handwritten notations of feet (*e.g.*, 0 feet, 1100 feet, 2050 feet) which correspond to actual 50-foot markers on the bull rail along the apron. Tr 157-58; ER Ex. 10.

On Pier 51, a different company (Pasha) uses the section of the pier from zero to 1350 feet. Tr 154. Matson uses the portion of the pier from 1350 to 2000 feet, which is a total of 650 feet. Tr 154.

On Piers 52 and 53, the markings start at zero (on the left) and go up to 2050 feet (on the right). Tr 154-55; ER Ex. 10. At the 1100 foot mark is the Water Tower. Tr 154; ER Ex. 10.

At the beginning of a shift, the Wharf Superintendent will receive, for his or her particular crane, a stow plan showing which rows and hatches to work. Tr 142. During the course of the operation, if there is a change in the sequence of the rows or hatches to work, a new plan is generated. (Hereinafter, this revised plan will be referred to as the “Paperwork.”) The Water Tower Senior Superintendent is notified of the revision and has the Chief Clerk print out the Paperwork. This Paperwork might need to be physically delivered from the Water Tower to the Crane Superintendent and Crane Clerk, and this process is referred to as the “Paperwork Delivery.” Tr 143. When delivery is needed, the Paperwork is placed on a clip and lowered from the Water Tower to the ground level for pick-up. Tr 149-50; ER Ex. 8; ER Ex. 9. Picking up the Paperwork simply involves driving by the Water Tower, and one can either get out of the truck or stay in the truck while grabbing the Paperwork. Tr 68.

On a discharge operation, it is rare to have Paperwork Delivery (Tr 144), and discharge operations constitute half of Matson’s vessel operations. Tr 144 (ratio of discharge operations to loadback operations is 50/50).

Paperwork Delivery is part of “stowage” because the Paperwork sets forth the sequence for stowing containers onto the vessel or barge. Tr 121 (the paperwork constitutes “stowage papers”). As Escorzon testified:

Q: And the load-back process is part of the stowage process?

A: Okay.

Q: Correct?

A: Part of the stowage process?

Q: Yes. Loading back is part of stowage?

A: Okay, yeah.

Q: And so if there's paperwork in operation for loading back, that's part of the stowage process?

A: Okay, yes.

Tr 91; *see also* Tr 113 (Escorzon's testimony that “the stow plans are the paperwork”). Paperwork Delivery has occurred about 75-80 times per week. Tr 197.¹⁴

When someone is doing Paperwork Delivery, the farthest left from the Water Tower they can go is Pier 51's 1350' mark, which is 1750 feet from the Water Tower (*i.e.*, 1100 feet plus 650 feet). Tr 156. Furthermore, Crane 7 does not typically go to farthest left point (*i.e.*, the 1350' mark); instead, Crane 7 – and the barge it is servicing – is usually much closer to the Water Tower as depicted on Employer Exhibit 10. Tr 155; ER EX 10. This means that the person doing Paperwork Delivery to Crane 7 would travel considerably less than 1750 feet.

The farthest right from the Water Tower they can go is the 2050' foot mark, which is 950 feet from the Water Tower. Tr 155-56; ER Ex. 10.

Employer Exhibit 11 is Teegarden's photograph of an actual operation, showing the close proximity between the Water Tower and the cranes. Tr 161. On the right is the Water Tower.

¹⁴ The amount of Paperwork Delivery can vary from shift to shift. Tr 70. At times, a shift has no Paperwork at all. Tr 71.

Tr 160. On the left (starting with the crane most in the foreground) are Cranes 5, 4, and 3 working on a vessel, with Cranes 2 and 1 in the background. Tr 160-61; ER Ex. 11. On this operation, Paperwork being delivered would go from the Water Tower on the right to one of the cranes on the left. Tr 161-62. The photograph shows the close proximity between the Water Tower and the cranes. ER Ex. 11.

Employer Exhibit 12 is Teegarden's photograph of the same operation, taken just a few minutes after the Employer Exhibit 11 photograph, and again showing the close proximity between the Water Tower and the cranes. Tr 162; ER Ex. 12. This photograph was taken from the Water Tower paperwork clip, looking across the roadway towards the Crane Clerk's white truck next to Crane 5. Tr 162; ER Ex. 12. Paperwork would be delivered from Teegarden's position at the Water Tower across the roadway to the truck. Tr 162-63.

Employer Exhibit 13 is a photograph of the Water Tower and the six parking spaces in front of it. Tr 164-65; ER Ex. 13.

A Paperwork Delivery takes about one minute or less. This is supported by the testimony of both Bright and Teegarden. Bright testified that, when he was a Runner, it took him about a minute to do a Paperwork Delivery. Tr 195. Teegarden testified that, when he drove from the Water Tower to the 1350' mark (the farthest point that the crane could be away from the Water Tower) and even stopping due to construction on the apron, it took one minute and 10 seconds. Tr 156.

2. Performing Paperwork Delivery

Matson's position is that anyone available with a truck within the CVS jurisdiction can perform Paperwork Delivery because the paperwork needs to get to the crane clerk in a timely

fashion. Tr 144. Matson's operation is based on productivity, and a delay in crane operations impacts productivity and can delay ship sailings, increase costs, and impact customers' receipt of their cargo. Tr 145. As Escorzon testified:

A: If there's new paperwork because there's changes, you can't continue on until you get your paperwork. Sure, sometimes they call numbers, but lots of times they just say, hold on, you got new paperwork coming up. We can't load whatever container we want, it's based on what the assignment is, so –

Q: So in that situation, would the crane just stop operating?

A: It can, yes.

Tr 72.

Q: Okay. So prior to August 2016 and after 2016, there's been situations that you witnessed where the cranes have stopped for five to ten minutes, because of wrong paperwork?

A: Maybe five minutes. When you start moving it to ten minutes and yeah, stuff starts – people start screaming. You never want to stop the operation. . . .

Tr 73.

Matson has never indicated that Paperwork Delivery should be done by only one classification, that it should be done exclusively by the Runner, or that it should be done exclusively by Superintendents. Tr 146. And in fact, the Paperwork Delivery has never exclusively been done by the Runner. Tr 167, 212.

a. Pre-July 2016

Since at least 2010, positions that have done Paperwork Delivery on a recurring basis include not only the Runner but also the Crane Clerk and the Wharf Superintendent. Tr 145; *infra*. Management (Teegarden himself) has also done Paperwork Delivery. Tr 145.

Paperwork was announced on the radio to the Runner. Tr 210-211. However, as noted above, about once or twice a week, there was no Runner on the shift. *Supra*. Also, there were

four to five times per week when Bright heard the Runner indicate on the radio that he was unavailable or too busy to get the Paperwork. Tr 198. If the Runner were not available, the radio announcement was made so that the Crane Superintendent or Crane Clerk could do the Paperwork Delivery. Tr 146, 211.

During this time (prior to the creation of the Assist Clerk), about 20% of the Paperwork Delivery was not done by the Runner. Tr 200; *see also* Tr 175. In those instances, the Crane Clerk and the Crane Superintendent would split the Paperwork Delivery 50/50. Tr 201. The Crane Superintendent did not have priority over the Crane Clerk in doing Paperwork Delivery. Tr 147.¹⁵ Sometimes, the Crane Superintendent does not even have a truck for the shift (Tr 105) and therefore could not possibly do Paperwork Deliver.

Sometimes the Crane Clerk picked up paperwork at the end of lunch and before returning to the crane. Tr 143-44.

b. July 2016 and thereafter

In July 2016, the Assist Clerk started doing Paperwork Delivery. Tr 202, 210. At that point, the Senior Superintendent notified the Runner of the Paperwork, and the Chief Clerk notified the Assist Clerk of the Paperwork. Tr 202. The Runner was then doing about half of the Paperwork Delivery. Tr 202.

Thereafter, in latter 2016, there was a Safety meeting where the Superintendents asked Teegarden to direct the Clerks to stop doing Paperwork Delivery and to make it exclusive to the

¹⁵ Escorzon acknowledged that Wharf Clerks have volunteered to her (as the Runner) that they would do the Paperwork Delivery. Tr 79-80. Although Escorzon said this happened rarely in her experience (three times), Escorzon does not work as a Runner on most shifts. Tr 91-92.

Runner. Tr 167. Teegarden indicated that it has never been the case for the Runner exclusively to do Paperwork Delivery, that he was not going to direct that, and that it was critical that the Paperwork Delivery gets done in a timely manner. Tr 167. Teegarden also told Superintendents that, although the Assist Clerk was now available to do Paperwork Delivery, that did not change the Superintendents' responsibility to continue doing Paperwork Delivery. Tr 169.¹⁶ (It must be remembered that Teegarden, as the General Manager, is the highest authority in the stevedoring operations.)

At this meeting, Teegarden was also verbally informed about alleged “racing,” although this was never provided to him in the form of a report. Tr 166. After receiving this information, Teegarden spoke to the Unit Chair for the Wharf Clerk and asked him if he were aware of any speeding or fast driving for Paperwork since the Assist Clerk began performing that function. The Wharf Clerk Unit Chair indicated he was unaware of this, and Teegarden said that any such racing would not be tolerated and that the Unit Chair should be vigilant and report anything to Teegarden. Tr 166, 168.

The Wharf Clerk Unit Chair has also expressed that it was okay for the Superintendent, along with the Assist Clerk, to get Paperwork. Tr 168.

Matson was not made aware of any issues involving near collisions or Runners being blocked from the Paperwork: Although Escorzon alleged that she reported this to Teegarden in a July 2016 safety meeting, Teegarden (who at the time was attending all Safety meetings) testified that he has never been told that the Runner was being blocked or denied physical access

¹⁶ Escorzon acknowledges that Teegarden said this, although she claims he did so in a July 2016 meeting. Tr 102.

in getting Paperwork, or that there have been any near misses or vehicle collisions. Tr 165.

Similarly, Bright (while he was a Senior Superintendent and attending daily pre-shift meeting through latter August 2016) never heard at these meetings or in other conversation any concerns that it was unsafe for both the Runner and Assist Clerk to do Paperwork Delivery, that the Runners were endangered or threatened by the Assist Clerks, or that the Assist Clerks were somehow blocking the Runners in Paperwork Delivery. Tr 203. Bright also was not aware of any instance where the Chief Clerk held the Paperwork until the Assist Clerk arrived. Tr 203.

Moreover, although Escorzon claimed that she had been blocked by the Assist Clerk from getting Paperwork, she admitted that there are six parking stalls in front of the Water Tower, that she can park in any one of them to get the Paperwork, and that the Assist Clerk has only a regular size truck or van. Tr 101.

Although Escorzon alleges that there was an August 2016 pre-shift meeting where Superintendents were told to stop doing Paperwork Delivery (Tr 76), this is not credible: She could not identify who allegedly said it, nor does she have anything in writing from Matson to this effect. Tr 103. Furthermore, Escorzon's allegation is refuted by the testimony of both Teegarden and Bright. For instance:

- Bright (who attended the daily pre-shift meetings while he was a Senior Superintendent through August 2016) is not aware that Matson ever told the Runners to stop doing Paperwork Delivery. Tr 213.
- During the entire time that Bright was a Senior Superintendent (through latter August 2016), Matson never told him to stop notifying the Runner of Paperwork to be delivered. Tr 203-204.
- Neither in August 2016 nor at any other point has Matson ever told the Runners to stop doing Paperwork Delivery. Tr 168.

- Neither in August 2016 nor at any other point has Matson ever told anyone in the Water Tower to stop notifying the Runners about Paperwork to be delivered. Tr 168.¹⁷
- Teegarden has never authorized any Matson manager or agent to tell the Superintendents to stop doing Paperwork Delivery. Tr 170.
- Teegarden is not aware of any Matson manager or agent telling the Superintendents to do Paperwork Delivery, nor would Teegarden authorize any such directive. Tr 170.¹⁸

Critically, to this day, Matson's expectation is that the Runner is still responsible for Paperwork Delivery. Tr 170. Therefore, to the extent that the Runner has largely stopped doing Paperwork Delivery, this was not at Matson's direction.

In addition, there are recurring periods when there is no Assist Clerk, and there was at least one recent incident when the Assist Clerk was off, and the Chief Clerk asked the Runner to do the Paperwork Delivery. Tr 169.

c. No Material Impact on the Teamsters Bargaining Unit

The vast majority of the positions in the Teamsters bargaining unit do not perform Paperwork Delivery (much less on a recurring basis) and have not had any duties reduced in or since 2016 with regard to Paperwork Delivery or otherwise. In other words, these positions are unaffected by any Paperwork Delivery change, and these positions include:

- Container Yard Supervisor. Tr 126 (Container Yard Supervisor not involved in Paperwork Delivery and has had no reduction in duties in or since 2016); 148 (Container Yard Supervisors have not done Paperwork Delivery and are not impacted by any change in Paperwork Delivery procedures).

¹⁷ Escorzon cannot probatively speak to what Senior Superintendents were doing in the Water Tower. As a part-time Superintendent until June 2018 (Tr 28), she did not work in the Water Tower (Tr 31). Although she sometimes went to the Water Tower, she was not assigned to work there, and her driving and patrolling duties were all outside the Water Tower.

¹⁸ In 2016, Teegarden attended every Safety meeting, although not every pre-shift meeting. Tr 183.

- Yard Controller. Tr 127 (Yard Controller not involved in Paperwork Delivery and has not had any duties reduced in or since 2016); 148 (Yard Controllers have not done Paperwork Delivery and are not impacted by any change in Paperwork Delivery procedures).
- Senior Superintendent. Tr 132-33 (Senior Superintendent not involved in Paperwork Delivery and has not had duties reduced in or since 2016); 147-48 (Senior Superintendents have not done Paperwork Delivery and are not impacted by any change in Paperwork Delivery procedures).
- 4 of 6 Superintendent rotations: Ship, RORO, Auto, Water Tower. Tr 137 (Ship Superintendent's duties not reduced in or since 2016); Tr 138 (RORO Superintendent's duties not reduced in or since 2016); Tr 138 (Auto Superintendent's duties not reduced in or since 2016); Tr 139 (Water Tower Superintendent's duties not reduced in or since 2016); 148-49 (these four Superintendent rotations have not done Paperwork Delivery and are not impacted by any change in Paperwork Delivery procedures).

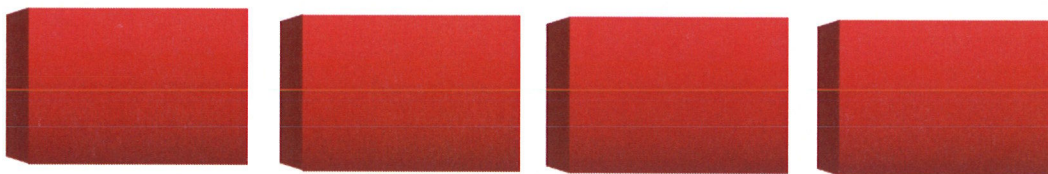
Nor has any change in Paperwork Delivery otherwise impacted the Teamster bargaining unit or its members generally. For instance, the Paperwork Delivery change:

- has not caused Matson to not schedule a Runner (Tr 163);
- has not caused Matson to reduce a Runner's hours on a shift (Tr 163);
- has not caused Matson to reduce a Runner's compensation (Tr 163);
- has not impacted the Runner's hours or wages (Tr 163);
- has not caused any layoffs (Tr 164);
- has not caused the reduction of any Superintendent positions (Tr 164);
- has not caused the removal of anyone from the bargaining unit (Tr 164); and
- has not caused the relocation of any workers (Tr 164).

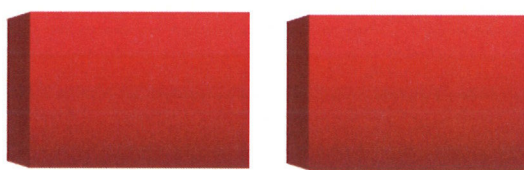
Based on the undisputed evidence, the diagram on the following page shows the miniscule impact that the Paperwork Delivery change has on the Teamsters bargaining unit on a typical shift – i.e., where there are 18-20 Teamster employees working, and only one Runner.¹⁹

¹⁹ The fact that different Superintendents rotate into the Runner position is irrelevant. The issue is what impact occurs from shift to shift, and only one person (at most) is affected per shift.

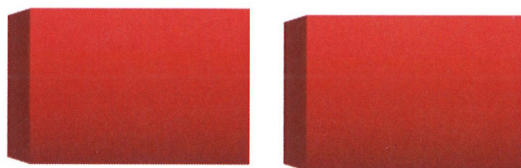
Container Yard Supervisors (4)



Yard Controllers (2)

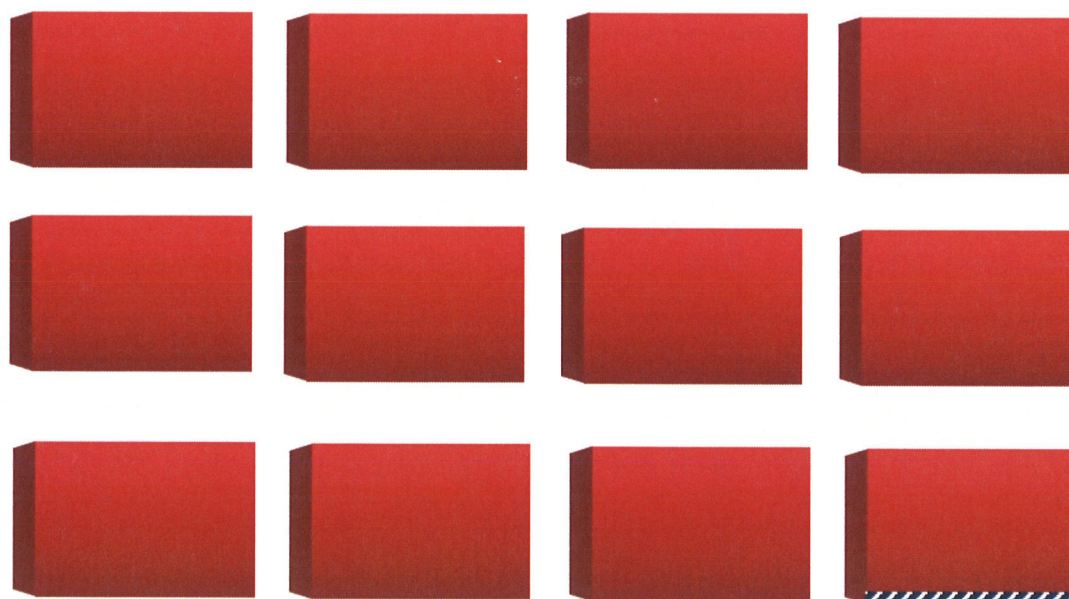


Senior Superintendents (2)



Red space = unaffected

Superintendents (10-12)



Paperwork
Delivery

(Runner)

E. Legal Proceedings²⁰

On May 17, 2016, the Teamsters filed Unfair Labor Practice Charge 20-CA-176385, alleging that Matson had unilaterally reassigned work – specifically, “giving out the menus and finding the MIAs” – from Teamsters employees to other employees. Jt. Ex. 2.²¹ Matson maintains its objection as to the relevance of the Menu and MIA work and agrees with the Administrative Law Judge’s comment that “the menu work is really not at issue in this case.” Tr 49. Moreover, and especially because the Menu and MIA work is the subject of this separate Charge 20-CA-176385, it would be inappropriate in this proceeding to find that Matson acted unlawfully as to Menu and MIA work, much less to base any determination in this proceeding on such finding.

On August 12, 2016, the Teamsters filed Unfair Labor Practice Charge 20-CA-179085, alleging that Matson unilaterally changed its time card procedure. Jt. Ex. 3. Matson maintains its objection as to the relevance of its time card practices. Moreover, and especially because the time card issue is the subject of this separate Charge 20-CA-179085, it would be inappropriate in this proceeding to find that Matson acted unlawfully as to time cards, much less to base any determination in this proceeding on such finding.

On November 14, 2016, the Teamsters filed Unfair Labor Practice Charge 20-CA-188087, which is the basis for the present proceeding. GC Ex. 1(a).

²⁰ The only court determination as to Matson and the Teamsters has been where Matson has tested certification on the grounds that the Teamsters employees were statutory supervisors, and it was found that the Teamsters was properly certified.

²¹ Menu work involves telling the Crane Operator what crane moves to make based upon the stow plan. Tr 46-47. MIA work involves searching for missing containers. Tr 58.

On March 23, 2018, the Region filed its Complaint and Notice of Hearing. GC Ex. 1(c).

On April 6, 2018, Matson filed its Answer to Complaint. GC Ex. 1(e).

III. DISCUSSION

As an initial matter, there is a dispute as to what exactly is the change in Paperwork Delivery. Matson acknowledges that, in July 2016, the Assist Clerk started doing Paperwork Delivery and that the function became regularly shared with the Runner. However, Matson adamantly denies issuing any directive or having any expectation that the Runner should stop doing Paperwork Delivery entirely. The record shows as follows:

- Teegarden testified expressly that Matson has never told or expected the Runner to stop doing Paperwork Delivery.
- Bright testified that he is unaware of any directive for Runners to stop doing Paperwork Delivery and that, while he was a Senior Superintendent through August 2016, he was never told to stop notifying the Runner of Paperwork.
- Although Escorzon alleged hearing someone say in a 2016 meeting that Runners should stop doing Paperwork Delivery, she could not identify who said it, nor does she have any written notice or other memorialization of this alleged comment. Furthermore, Teegarden is the highest authority in the stevedoring department, and Escorzon's own account is that Teegarden in 2016 directed the continuing performance of Paperwork Delivery.
- A directive for the Runner to stop Paperwork Delivery would not make any sense from an operational standpoint, given that Matson wants and has always had efficiency and flexibility in this regard.
- Matson did not allow any conditions that would cause the Runners to stop doing Paperwork Delivery: Although Escorzon alleged that the Assist Clerk was blocking the Runner and causing other issues, Teegarden was never notified of this. Although Teegarden did hear about alleged "racing," he promptly spoke to the Wharf Clerk Unit Chair to confirm this was not happening and would not be tolerated.

But even assuming *arguendo* that the change does involve the Runner's complete cessation of Paperwork Delivery and that this somehow can be imputed to Matson, there is still

no violation because the defenses below apply regardless of whether the Runner's involvement in Paperwork Delivery was reduced or completely removed.

A. The Paperwork Delivery Change Was Not Unlawful Because It Was Necessitated by the Wharf Clerk CBA

Pursuant to its CBA with the ILWU, Matson was required to permit the Assist Clerk to perform Paperwork Delivery and therefore did not have to bargain with the Teamsters about this.

As the Board has recognized, an employer need not bargain about an action it is required to undertake. *See, e.g., Murphy Oil USA, Inc.*, 286 NLRB 1039, 1042 (1987) (where OSHA rule prohibited consumption of food in areas exposed to toxic material, employer could unilaterally impose a work rule in accordance therewith; "Respondent was not only within its rights, but also legally bound to adopt a rule that complied with Federal Law. I, therefore, find no violation of Section 8(a)(5) by its unilateral imposition of this rule"); *Exxon Shipping Company*, 312 NLRB 566, 568 (1993) ("we find the Respondent was permitted to adopt a rule that complied with Federal maritime law. Accordingly, we find no violation of the Act"); *Standard Candy Co.*, 147 NLRB 1070, 1073 (1964) ("the Company was required to comply with the new minimum wage rate established under the FLSA and, accordingly, raised the pay rate for seven of its employees from \$1.15 to \$1.25 an hour. I find the Company did not violate the Act in adopting these wage changes"); *cf. Raytheon Technical Services*, 126 LA 982, 984 (Arb. Robert Kilroy, 2009) (where company assigned work pursuant to contract language pertaining to Painter Workers' duties, notwithstanding any alleged past practice of not giving such assignments, "the Company was under no obligation to give Notice prior to implementing the full scope of the Painter Worker classification").²²

²² Put another way, bargaining under such circumstances would be futile. *See Herbert Harvey, Inc. v. NLRB*, 424 F.3d 770, 774-75 (D.C. Cir. 1969) (employer "is not required to do the impossible or to

In the present instance, the Assist Clerk (a position in the Wharf Clerk bargaining unit) has a contractual right to do the Paperwork Delivery. For instance:

- The ILWU CBA states that “stowage” is within the Wharf Clerks’ jurisdiction. “Stowage” involves loading back containers onto the vessel and encompasses the Paperwork which sets forth the loadback sequence. This was recognized not only by Matson (Teegarden) but also by Escorzon.
- The September 2008 Letter of Understanding between Matson and the ILWU recognizes that “directing and executing the flow of cargo” are “traditionally wharf clerk functions” The Paperwork is part of the direction/execution of the flow of cargo because it tells the crane operator the sequence and location for loading cargo.
- Long before the Assist Clerk started doing Paperwork Delivery in 2016, Crane Clerks had been doing Paperwork Delivery. When the Runner was unavailable, the Wharf Superintendent and the Crane Clerk generally shared 50/50 in the Paperwork Delivery.
- In 2005 or 2006, based on the ILWU contract language, Matson took away from the Superintendents and gave to the Clerks the job of directing RORO drivers on moving cargo. Tr 184. This directing of RORO drivers is analogous to the handling of the Paperwork which dictates the sequence for loading cargo.

To the extent that the GC argues that Paperwork Delivery cannot be within the Wharf Clerk’s jurisdiction because Matson has allowed Superintendents to share in this function, this argument would be unavailing: The shared responsibility does not mean that Wharf Clerks do not have a jurisdictional right to this work. It would be up to the ILWU to file a grievance, and here the Wharf Clerk Unit Chair has already expressed a willingness for the ILWU Assist Clerk and the Teamster Runner to share in Paperwork Delivery.

Accordingly, the Complaint should be dismissed on the grounds that Matson did not have to bargain about Paperwork Delivery changes that were legally required.

engage in a mere exercise in futility; rather, the purpose of collective bargaining is to produce an agreement and not merely to engage in talk for the sake of going through the motions. And the doing of a useless and futile thing is no more required in collective bargaining between an employer and a labor union than in other activities”) (quotations citations omitted).

B. The Paperwork Delivery Change Was Not Unlawful Because It Was Not Material, Substantial, and Significant

Alternatively, even assuming *arguendo* that there were no requirement to have the Assist Clerk perform Paperwork Delivery, there is still no violation because any change in Paperwork Delivery was not material, substantial, and significant.

It is well-settled that an employer's duty to bargain about changes in terms and conditions of employment arises only when the changes are "material, substantial, and significant." *See Peerless Food Products, Inc.*, 236 NLRB 161 (1978) ("But not every unilateral change in work, or in this case access, rules constitutes a breach of the bargaining obligation. The change unilaterally imposed must, initially, amount to a material, substantial, and significant one") (citing *Rust Craft Broadcasting of New York*, 225 NLRB 327 (1976)); *North Star Steel Co.*, 347 NLRB 1364, 1367 (2006) ("Generally, an employer has a duty to bargain with the exclusive representative of a unit of its employees before making a change in wages, hours, or other working conditions, but that duty arises only if the change is a material, substantial, and a significant one affecting the terms and conditions of employment of bargaining unit employees").

The burden falls on the General Counsel to prove that the change was material, substantial, and significant. *See North Star Steel*, 347 NLRB at 1367 ("The General Counsel bears the burden of establishing that the change was material, substantial, and significant"); *see also infra*.

Although a change in duties that results in increased or reduced pay/hours of work could be material, substantial, and significant, the converse is also true: If a change in duties does not affect schedule or pay (and does not result in the removal of positions or personnel from the

bargaining unit), it generally does not trigger a duty to bargain.²³ The following cases are illustrative.

In *Ead Motors Eastern Air Devices, Inc.*, 346 NLRB 1060 (2006), the employee held the toolroom position, but “for probably half of her time” she was performing duties in the stockroom. The employer then completely eliminated the employee’s toolroom position, causing her half-time toolroom duties to disappear and her part-time stockroom duties to expand to full-time. The Board found that the employer had no duty to bargain about this change, given that the employee’s schedule, pay, and at least some of her duties appeared to be unchanged.

The record does not demonstrate that French’s transfer from the toolroom to the stockroom, and the attendant elimination of the toolroom position, amounts to such a change. The elimination of the toolroom position did not affect French’s pay or her schedule. As to her duties, prior to the Respondent’s elimination of the toolroom position, French’s work involved working some of her time in the toolroom and some of her time in the stockroom. Because of the change, French merely began doing full time what she had been doing part time. There is no evidence concerning the duties of either position. Based on all of the above, we find that it has not been established that the elimination of the toolroom position altered French’s job duties in any material, substantial, and significant way. As such, we find that the unilateral change to French’s terms and conditions of employment was de minimis, and that the Respondent did not violate Section 8(a)(5) and (1) in this respect.

Id. at 1065. **In short, even a modification to half of an employee’s total duties – without a change to schedule or pay – did not constitute a material, substantial, and significant change.**

²³ In cases where the Board has found an unlawful transfer of work, there has been the removal of entire positions or personnel from the bargaining unit, which is clearly not the case here. *See Westinghouse Elec.*, 313 NLRB 452 (1993) (employer had a duty to bargain about layoff decision); *Hampton House*, 317 NLRB 1005 (1995) (employer had duty to bargain as to five employees who were promoted from bargaining unit into supervisory positions but still performed their same bargaining unit work); *Kohler Co.*, 273 NLRB 1580 (1985) (employer had duty to bargain about removal of the entire stock clerk position from the bargaining unit); *Stone & Thomas*, 221 NLRB 573 (1975) (employer had duty to bargain about physical transfer of employees to different job sites, which also involved some employees having different hours/schedules or switching to different positions).

In *North Star Steel*, the employer unilaterally transferred the production of 175 tons of steel from its Monroe facility to its St. Paul facility. The Board found that this unilateral transfer did not violate the Act because it did not adversely affect the employees, noting in particular that there was no loss of work hours/wages.

The General Counsel offered no evidence that the December transfer of 175 tons of steel production adversely affected any employee. The judge noted that the timing ‘coincided’ with reduction in employee hours and contemplated layoffs due to business downturn affecting the steel industry. There is no dispute that the steel industry was suffering depressed business conditions that affected the Respondent. But there is no evidence in the record that demonstrated a causal connection between this minimal transfer of unit work in December and the reduction in the employee hours in November and the layoffs in January 2001. In fact, the General Counsel offered no evidence concerning the number of employees or the number of work hours involved in processing the 175 tons at either the Monroe or St. Paul facilities.

347 NLRB at 1366-67 (emphasis added).

In *MMC Materials, Inc.*, 2005 NLRB LEXIS 538 (2005), the employer, among other things, (a) changed the drivers’ schedule from a fixed start time to a staggered start time that required drivers to call in each afternoon to find out their next day’s reporting time; and (b) reassigned the plant operator’s duties of preparing a dispatch ticket to a newly-created Central Dispatch service. *See id.*, at *32-37, 48-49. The Administrative Law Judge found that such changes were not material, substantial, and significant. As to the schedule change, the Administrative Law Judge found that the “inconvenience” and “disadvantage” to the drivers was insufficient:

Counsel for the General Counsel submits that without a standardized start time, drivers were required to call in each afternoon to find out their reporting time for the next work day. While this may pose an inconvenience for drivers, the Board has found that the mere fact that an employee is “disadvantaged” by a change is not alone sufficient to satisfy the test of whether a change must be bargained.

Id., at *38 (emphasis added). As to the loss of ticket duties, the Administrative Law Judge also found this to be of “no significant detriment.”

Even when an employer makes a change that would otherwise pertain to a mandatory subject of bargaining, the Board has not found a violation when there has been no significant detriment to unit employees. *See Alamo Cement Co.*, 277 NLRB 1031 (1985). In summary, I do not find that Respondent has unilaterally changed the job duties as alleged. Additionally, even if there was a change in job duties, such change does not constitute a material, substantial, or significant change.

Id., at *59 (emphasis added).

In *Alamo Cement Co.*, 277 NLRB 1031 (1985), the Board found that the employer’s reclassification of an employee from mix chemist to assistant chief chemist – resulting in the employee preparing reports for the Chief Chemist and filling in for the Chief Chemist – was not a material, substantial and significant change. This was the case even though the reclassification changed the employee’s hourly wage.²⁴ *Id.* at 1031.

Critically, where there is ambiguity or insufficient evidence of how a change affects the bargaining unit employees, the General Counsel has not met his burden. *See, e.g., North Star*, 347 NLRB at 1366-67 (finding no violation where, although employer unilaterally transferred production of 175 tons of steel from Monroe facility to St. Paul facility, there was “no evidence [of any] reduction in the employee hours”); *The Fremont-Rideout Health Group*, 357 NLRB 1899, 1904 (2011) (finding no violation where, although employer issued a memorandum describing change in counting absences under attendance policy, the General Counsel presented no evidence of the specific impact on employees); *McKesson Corp.*, 2014 NLRB LEXIS 851

²⁴ The Board has found changes insufficiently material in other situations as well. *See, e.g., Peerless Food Products, Inc.*, 236 NLRB at 161 (employer’s limitation of union business representative’s access to employees was not a material, substantial, and significant change); *J.W. Fergusson & Sons, Inc.*, 299 NLRB 882, 892 (1990) (“transferring five minutes from the afternoon break to the lunch break, thus diminishing the afternoon break by five minutes and enlarging the lunch period by five minutes,” was not a material, substantial, and significant change).

(2014) (finding no violation where, although employer eliminated the paid Gold's Gym benefit and replaced it with paid membership at one of the gyms affiliated with employer's benefit program, "there is insufficient evidence to establish whether there is a difference between the dollar value of the benefit, for employee and family member, under the old program and the comparable dollar value under the new program. Without this evidence, the General Counsel cannot carry the government's burden of proving that the change was material, substantial, and significant"), *adopted in* 2015 NLRB LEXIS 722 (2015); *Mike-Sell's Potato Chip Co.*, 2017 NLRB LEXIS 374, at *75 (2017) (finding no violation where, although employer sold its delivery trucks which could have impacted its drivers' work opportunity, the General Counsel and Union failed to show how this created a material, substantial, and significant change to the drivers).

In the present situation, the General Counsel fails to meet his burden to show that the Paperwork Delivery change constitutes a "material, substantial, and significant change" to the supervisors.

First, the record is undisputed that the change had no impact on the scheduling of the Runner, the Runner's hours on a shift, and the Runner's wages and compensation. The record is also undisputed that the change has not caused any layoffs, any reduction of Superintendent positions, the removal of anyone from the bargaining unit, or the relocation of any workers. In light of the Board law, these facts alone necessitate a determination that the change was not material, substantial, and significant.

Second, insofar as the change affected job duties, it only affected the Runner Superintendent. The record is undisputed that that the Runner is only one out of up to 20 people

on any given shift, and thus the vast majority of Teamster employees on any shift are unaffected.

In other words, the Paperwork Delivery change had no impact on:

- The 4 Container Yard Supervisors
- The 2 Yard Controllers
- The 5 Senior Superintendents
- The multiple Ship Superintendents
- The multiple RORO Superintendents
- The multiple Auto Superintendents
- The multiple Tower Superintendents.

Again, the diagram included in this brief (*supra*) illustrates the miniscule impact on the Teamsters bargaining unit.

Third, even as to the Runner (one out of 20 Teamster workers on a shift), the impact is limited. For instance, without Paperwork Delivery, the Runner still has a wide range of other duties to perform. As Escorzon herself testified, both before and after August 2016, as a Runner she has performed duties including:

- Transporting most labor to and from the vessel or crane;
- Patrolling the apron and yard and reporting any hazards or potential hazards;
- Monitoring cab drivers to ensure the proper parking of chassis and bomb carts;
- Working with a Hi-Lift Driver and Wharf Superintendent to ensure cone baskets are set up properly;
- Waking up sleeping cab drivers;
- Ensuring that cone poles, wires, shackles, and other equipment is returned to the proper area; and
- Providing equipment for laborers, such as hammers, raincoats, ear plugs, water, etc.

Tr 89-90.

In addition, the actual amount of lost time in Paperwork Delivery is minimal. As Bright testified (without dispute), Paperwork Delivery occurs 75-80 times per week (not per shift).

Each delivery takes one minute, for a total of 75-80 minutes per week. When this is divided over

the 14 weekly shifts (*i.e.*, one day shift and one night shift each day, 7 days per week), this averages out to 5.7 minutes per shift.²⁵

By contrast, transporting laborers – which the Runner still performs – takes considerably more time. As Bright testified, there are approximately 20 or 40 transports in a single shift (depending upon whether it is a start-up operation). Assuming each transport takes 3 minutes (Bright testified it takes 1 to 5 minutes, and Escorzon testified it takes 10 minutes),²⁶ that is 60 to 120 minutes per shift, which is far more than the 5.7 minutes per shift of Paperwork Delivery. (Escorzon also testified that transporting the Signalmen alone can take 30 to 60 minutes per shift, and that up to 2 hours can be spent per shift on running the manning. Tr 56.)

Furthermore, the only impact of the change is that the Runner gets (slightly) less work, which can be viewed as preferable to getting more work. In other words, the Runner is getting the same pay for doing a little less.

To the extent that the GC argues that the materiality should be evaluated not only by the Paperwork Delivery changes but also by other changes (Menu and MIA work), that argument would fail. The other changes cannot be considered along with the Paperwork Delivery because those are the subjects of separate Charges not at issue here. The Region chose to pursue the Paperwork Delivery as a standalone issue in the present Complaint. There would be procedural

²⁵ Even accepting Escorzon's estimate that it takes 2 to 7 minutes to do a Paperwork Delivery (Tr 69) and generously taking an average of 5 minutes, this is still only 400 minutes per week, or 28 minutes per shift (shifts are usually ten hours long, plus a lunch break).

Although Escorzon testified that she lost 2 hours of work (*i.e.*, gained 2 hours of downtime) per shift, she was including the loss of Menu and MIA work (Tr 80-81), and therefore the GC has failed to submit probative/reliable evidence as to how much time Escorzon lost as a Runner due specifically to the loss of Paperwork Delivery.

²⁶ It makes sense that the transport takes some time since it involves not only driving but also waiting for the gang of laborers to assemble and having them getting in and then of the truck.

and due process deficiencies if the present Complaint were sustained based upon conduct that is the subject of a separate charge(s), that the Region is separately pursuing, and as to which no legal findings have been made.

Indeed, it would be an inappropriate end-run for the Region to obtain any ruling in this case that suggests that Matson acted unlawfully with regard to Menu and/or MIA work. Matson is still entitled in separate proceedings to establish its defenses including, without limitation, that any change was not material, substantial, and significant; that such work was legally required to be given to the ILWU;²⁷ and that any change preceded the D.C. Circuit's mandate and therefore could not have been in contempt thereof.

Alternatively, even if the other Changes were to be considered (which they should not be), the aggregate of the alleged changes would still not be material, substantial, and significant. Escorzon's testimony was that, as a Runner, she lost two hours per shift due to Paperwork Delivery, Menu, and MIA changes. But this still does not alter the fact that (a) this only affects the Runner position (one out of up to 20 Teamster workers on any given shift); (b) even as to the Runner position, there was no impact on schedule, hours, wages, or compensation; (c) the Runner continues to perform substantial work, including the most important and time-consuming task of transporting labor; and (d) this merely means that she is getting the same pay for even less work.

To the extent that the GC argues that allowing the Paperwork Delivery change creates a slippery slope to Matson eradicating the Runner rotation entirely, that is purely speculative, not based on the record, and false: Matson has no intention of eliminating the Runner position. If

²⁷ Although Matson was not required to defend the Menu/MIA issues in this proceeding, the record here does contain at least some evidence that Matson also gave Menu work to Clerks based on "stowage" language in the CBA. Tr 173-74.

anything, the record shows that transporting labor – one of the Runner’s central functions – is an indispensable task and essential for workplace safety.

To the extent that the GC argues that the Paperwork Delivery change has eroded support for the Teamsters, that would also be speculative and unsupported by the record. Escorzon’s attempted testimony on this issue was barred as hearsay and/or lacking probative value. Tr 84. In any event, potential erosion of union support in and of itself is not a touchstone for whether a change is material, substantial, and significant; to the contrary, as noted above, the Board looks at metrics such as wages, hours, and layoffs.

For the foregoing reasons, the GC fails to meet his burden of proving that Paperwork Delivery change was material, substantial, and significant.

C. There Is No Obligation To Give The Paperwork Delivery Exclusively To The Runner

Assuming arguendo that the Complaint were to be sustained (which it should not be), the restored status quo cannot be that the Runner (or Superintendent group) acquires exclusive jurisdiction over Paperwork Delivery. As noted above, this has never been the practice, and to the contrary Wharf Clerks have repeatedly done Paperwork Delivery, and at times so has management. Imposing such an exclusive entitlement would put the Teamsters in a different position than had ever existed before – one that would impair Matson’s productivity, efficiency, and longstanding flexibility in this regard.

IV. CONCLUSION

For the foregoing reasons, Matson respectfully requests that the Complaint be dismissed and that Matson be found to have acted lawfully with regard to any Paperwork Delivery change.²⁸

²⁸ Insofar as the GC seeks a reading of Notice remedy, that would be unwarranted, and not only because there has been no violation. A public reading is an “extraordinary” remedy, reserved for those rare cases where the unfair labor practices are egregiously “numerous, pervasive, and outrageous.” *See Federated Logistics and Operations*, 340 NLRB 255, 256 (2003) (“The Board may order extraordinary remedies when the Respondent’s unfair labor practices are so numerous, pervasive, and outrageous that such remedies are necessary to dissipate fully the coercive effects of the unfair labor practices found”); *Edro Corp. dba Dynawash*, 2015 NLRB LEXIS 228, at *29, 362 NLRB No. 53 (2015) (“Requiring an owner or high official of a company or a union to actually read aloud the notice to its assembled employees has not been typically required except in unusual circumstances. In *Federated Logistics & Operations*, 340 NLRB 255, 256-57 (2003), the Board described this as an ‘extraordinary’ remedy”).

Accordingly, the Board has ordered public reading only in cases that involved a widespread and pervasive series of violations. The violations typically include, among other things, unlawful discharge or discipline. *See Federated Logistics and Operations*, 340 NLRB at 256-57 (ordering public reading where employer unlawfully interrogated employees, created the impression of surveillance, solicited grievances, promised benefits, threatened employees with loss of existing benefits, threatened to move its operations, withheld benefits, and discriminatorily suspended employees for engaging in protected activity); *Jason Lopez’ Planet Earth Landscapes, Inc.*, 358 NLRB No. 46 (2012) (ordering public reading where employer illegally laid off three employees including the leader of organizational campaign who was also a witness in the representation case, promised benefits, threatened to close the business and reopen it under a different name, and committed other violations).

Conversely, a public reading was found to be unwarranted in other situations even where unlawful discharge had occurred. *See Dynawash*, 2015 NLRB LEXIS at 35 (no public reading in case where employer committed unlawful discharge); *NLRB v. Laney & Duke Storage Warehouse Co.*, 369 F.2d 859 (5th Cir. 1966) (no public reading in case where employer unlawfully discharged four employees and also committed “flagrant pre-election violations” including interrogation of employees about union activity, encouragement to engage in anti-union activity, surveillance of union activity, promises of economic benefits and threats of economic reprisals).

DATED: Honolulu, Hawaii, July 24, 2018.



BARRY W. MARR
CHRISTOPHER S. YEH

Attorneys for Employer
MATSON TERMINALS, INC.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

MATSON TERMINALS, INC.,

and

HAWAII TEAMSTERS & ALLIED
WORKERS UNION, LOCAL 996.

Case 20-CA-188087

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 6, 2018, by the method of service noted below, a true and correct copy of the foregoing document was duly served upon the following:

Scott E. Hovey, Jr.
Counsel for the General Counsel
National Labor Relations Board, Subregion 37
300 Ala Moana Boulevard, Room 7-245
Honolulu, HI 96850-7245
E-Mail: dale.yashiki@nrlrb.gov

*Via E-Filing
& E-Mail*

Vernon Yu, Esq.
Hawaii Teamsters and Allied Workers Local 996
1817 Hart Street
Honolulu, HI 96819
E-Mail: loc996@hawaii.rr.com

Via E-Mail

DATED: Honolulu, Hawaii, July 24, 2018.



BARRY W. MARR
CHRISTOPHER S. YEH

Attorneys for Employer
MATSON TERMINALS, INC.